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# STUDY PROJECT

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## THE YAMASHITA DECISION

BY

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THE YAMASHITA DECISION

AN INDIVIDUAL STUDY PROJECT

by

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U.S. Army War College  
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## ABSTRACT

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The historical introduction and the facts surrounding the trial provides foundation for the student to discuss the ethical ramifications in the case of General Yamashita.

In the review and conclusion the student can gain some insight into the precedent that was set in defining command responsibility.

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## THE YAMASHITA DECISION

### CHAPTER I

#### INTRODUCTION

The ethical and moral standards that our senior leaders exhibit in times of conflict are the distinct results of the history, environment, and the times in which they live. Nowhere is the challenge to the leaders ethical, and moral behavior so evident than on the field of battle. Nowhere does emotion, fear, and tradition become more pronounced than in the decisions that effect the lives of those around you. War in itself could be a crime against all those who participate but in the controlled violence of war, and its aftermath, the atmosphere is often tainted with the righteousness of our history and the moment.

The Yamashita decision is a case study that analyzes the decision made by General MacArthur in 1945 to execute a defeated commander for the acts of subordinates. The Yamashita decision tests the moral, and ethical implications of command responsibility in life and death situations during and after a conflict.

The case study is written to promote thought and discussion as to the moral and ethical principles by which we judge senior leaders.

## CHAPTER II

### HISTORICAL BACKGROUND

"Tomoyuki Yamashita, General Imperial Japanese Army, between 5 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while Commander of Armed Forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines and he, General Tomoyuki Yamashita, thereby violated the laws of war."1

Charges brought by the Reynold's  
Commission, 8 October 1945

The charges against General Yamashita on 8 October 1945 ended a professional army career that began in 1908 when he was commissioned to the infantry. He was not of the old Samurai class, but of a new breed of officer from the middle class. His early attendance at military schools were marked by diligent study, and participation in rigorous training. He was by all accounts an exceptional student. After a tour of duty with the General Staff in Tokyo, Yamashita was posted to Berne as the assistant military attache and after another tour in Japan he became the military attache to Vienna. His ability to speak the German language permitted him to travel extensively, and promoted in him an appreciation of the western world during his six years on the continent.



Upon his return to Japan in 1930 he was promoted to Colonel and given command of an infantry regiment. For the next seven years he was caught up in the political turmoil of his country that split the Army into factions over the destiny of the Empire. Although he was sympathetic to the expansionist ideas of some of the officers he maintained a position on the perimeter of the conflict. By maintaining a position on the periphery he became a mediator between the Emperor and the factional groups. In the end he was able to maintain his position in the Army but was essentially exiled to Korea to command a brigade while the Army was purged of some 2,000 officers.

After the posting to Korea he served as the Chief of Staff to the North China Army and later commanded a division. In 1940 he was called back to Japan, and then posted to Europe to study the German and Italian armies as they waged war in Europe. His review of the action in Europe convinced him that the Japanese army had many deficiencies that would take several years to fix. This report did not please his superiors, and he was sent to command the Japanese Army in China in early 1941. In November 1941 he was recalled to Japan, and was told that he would take command of the 25th Army that was preparing for the attack on Malaysia.

The staff that was presented to him was a group that had been gathered from all over the Japanese Army. Although the staff had not worked together before, and was haphazard in formation, it proved to be more than adequate to defeat the forces in Malaya. Later, when General Yamashita assumed command of the forces in the Philippines the scenario would be much the same but with the opposite result.

General Yamashita's victory in Malaysia gained him a reputation of success, and a deeper personal knowledge of the conduct of land warfare. His leadership and personality was a key in the successful campaign. In 73 days, 60,000 Japanese soldiers took over 130,000 allied soldiers prisoner, and gave Japan its greatest victory in history.

During the period immediately following the surrender the situation was chaotic in the city of Singapore, especially with the lack of water, and power. Yamashita worked diligently to have the basics of city life restored. He also understood the importance of decent treatment of prisoners of war, "As he believed that Japan would face a day of reckoning as soon as the U.S. harnessed her mighty industrial potential for the war effort."2

Yamashita began developing plans to continue the 25th Army's push through South Asia. But, in July he was transferred back to China to assume command of the first Army Group. Although the command was important from a strategic sense, his political foes from his early days in the Army sent him to the back burner to slow down his growing popularity after the Malaya campaign.

In July of 1944 Saipan was captured, and for the first time the mainland of Japan was in reach of U.S. forces. A final defense plan for the Philippines was drawn up in Tokyo, and Yamashita was recalled from China in September 1944. The plan essentially called for a final defense with over 300,000 soldiers, and naval personnel in the Philippines. Yamashita went to Tokyo on September 25 1944, received his instructions to defend the Philippines, and arrived in Manila on the 5th of October.

The situation in the Philippines was bleak and Yamashita faced several immediate problems. "He did not know his staff and had little time to mold them to his ways; he had only a superficial understanding of the problems facing his command; had too few troops that were well trained; and deficiencies in all areas of supply were woefully apparent."<sup>3</sup> As the days passed he worked

hard to overcome the weaknesses of his command. He personally visited units, inspected training and observed logistical operations. There was not enough time to accomplish all he wanted to do and in January 1945 as U.S. forces began the final assaults on the Philippines Yamashita drew his Army into three groups on the island of Luzon. "Directly under his command the Shobu Group of approximately 152,000 men would defend the northern part of Luzon; the Kembu Group of 30,000 under Major General Tsukada would look after the central zone of Bataan and the area which included Clark Field; while the Shimbu Group of 80,000 under Lieutenant General Yokoyama would defend the lower half of the island from Manila down through the Bicol Peninsula (Appendix 1). On the 1st of January 1945 Tommages 4th Air Army was put under Yamashito's command, and five days later he gained command of the shore based naval troops."4 It had taken from October 1944 for Yamashita to gain positive control (on paper) of all the forces in the Philippines. This division of command created severe problems for Yamashita in coordinating and controlling all of the military units in the area. It often would appear that each commander had his own agenda for the conduct of the war. In addition to his own internal command and control problems he faced a continuous problem with the attitude of the Filipinos and increasing attacks by guerilla forces. The guerilla attacks on

Japanese soldiers led Yamashita to make the statement to the press that "Those who stand against the Japanese Army must be regarded as their enemies. In the Philippines today, the war has come to a situation of kill or be killed. No matter who the person is, a Filipino or not, if we hesitate, we ourselves will be killed."<sup>5</sup>

As the U.S. forces landed on Luzon and the fighting continued Yamashita decided to leave Manila and fall back on successive defensive positions in the mountains. Although he had passed instructions down to the subordinate Army military commanders, the Naval commander in Manila decided that he would follow his original assigned orders from the Navy to defend the city at all costs. During the pull-out of Army forces both the Army commander and Yamashita lost contact with the Navy in Manila and neither knew exactly what was transpiring in Manila. "At the end of March the Naval commander had lived up to his original orders and over 1,000 Americans had died along with 16,000 Japanese and 100,000 Filipinos."<sup>6</sup> By late June the main force in the Shobu Group of barely 50,000 men had taken up final defensive positions near Bontoc (Appendix 2). The Shobu Group was less than combat effective and barely had enough supplies to maintain day-to-day activities.

On 2 September 1945 General Yamashita left his command post in the mountains and surrendered to U.S. forces.

After Yamashita surrendered he was taken to a government house to sign a formal document of surrender even though the Japanese had already formally surrendered aboard the Missouri. "Across the table from Yamashita gazing at him over the paperwork was General Percival. The British general was commanding no units in the Philippines, but MacArthur felt it appropriate and fitting that Percival's earlier humiliating surrender now be cleansed."7

#### ENDNOTES

1. Frank A. Reel, The Case of General Yamashita, page 32.
2. A.J. Barker, Yamashita, p. 54.
3. Ibid., pp. 106-107.
4. Ibid., p. 125.
5. John D. Potter, The Life and Death of a Japanese General, p. 106.
6. Barker, p. 136.
7. Lawrence Taylor, A Trial of Generals, p. 141.

## CHAPTER III

### THE TRIAL

General MacArthur upon accepting the Japanese surrender aboard the Missouri stated to the press that "As Supreme Commander for the Allied Powers, I announce it my firm purpose, in the traditions of the countries I represent, to proceed in the discharge of my responsibilities with justice and tolerance. Standing ominously at his side were Generals Wainwright and Percival who had suffered the most humiliating allied defeats of the war."1

In late September 1945 President Truman transmitted a message to MacArthur that the punishment of Japanese who had been captured "be directed to proceed without avoidable delay with the trial by court martial and the punishment of such Japanese war criminals as have been apprehended or as may be apprehended."2 This message provided MacArthur the only extra encouragement he needed to proceed with all deliberate speed the trial of Japanese generals he had captured.



General MacArthur established a military commission consisting of five general officers. This commission became known as the Reynold's Commission, so named after the president of the commission, Major General Reynolds. Major General Reynolds had recently arrived in Japan from Chicago where he commanded the South Service Command. "Although Major General Reynolds had no legal training he was also designated the law member for the commission."3 Only one of the five members had combat experience in WWII. An understanding of combat would be important in resolving the issues of communication with subordinates and misinterpretation during crisis situations. That none of the five members had any legal background is significant in that this case had the potential of setting precedent on the theory of command responsibility in land warfare and future trials of captured enemy officers. Without some basic legal understanding of the law of land warfare and common law it is difficult to understand how the layman could reach any concrete determination on rules of law.

On October 2 1945 General Yamashita was served with the following charge:

"Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to

discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the law of war."4

On October 8 1945 the prosecution submitted a bill of particulars, containing 64 particulars that were later amended on October 25, 1945, with an additional 59 specifications prefaced by the allegation that;

"members of the armed forces of Japan, under the command of the accused were permitted to commit the following during the period of 9 October 1944 to 2 September 1945 at Manila and other places in the Philippine Islands..."5

In the trial counsel's opening remarks he reminded the commission of their broad discretionary powers in conducting the trial, the acceptance of evidence, and broad general procedural guidelines. He stated that; "The Articles of War are not binding upon, do not apply to the commission. This commission, sir, is not a judicial body: it is an executive tribunal set up by the Commander-in-Chief."6

The trial counsel was exactly right. Under the provisions established by General MacArthur in the command's "Regulations Governing the Trial of War Criminals" the commission had wide discretionary power. "Section 13 read in

part: A commission shall: a) confine each trial strictly to a fair, expeditious hearing on the issues raised by the charges, excluding irrelevant issues or evidence and preventing any unnecessary delays or interference."7

It appears that the commission could take whatever measures it deemed appropriate, to reach a conclusion in the least amount of time.

Over the next few weeks a parade of witnesses appeared before the commission, all under the scrutiny of the press. A reporter dispatched the following which reflects at least a portion of the foreign press thoughts on the hearings; "The trial is supposed to establish that a military commander is responsible for any acts of any of his troops. At the same time, under British law, anyway he's supposed to have rights."8

The lengthy presentations by counsel of all the crimes that occurred in the Philippines (Appendix 3) and the cross examination of witnesses led Major General Reynolds to order the following: "As a further means of saving time... cross examination must be limited to essentials, and avoid useless repetition of events or opinions. Except in unusual or extremely important matters, the commission will itself determine the credibility of witnesses."9 In the

commission's opinion this would help to speed things along. "This action may have been at the suggestion of General MacArthur who wanted the commission to finish its work as swiftly as possible."<sup>10</sup>

General Yamashita took the stand in his own defense and denied any knowledge of the atrocities committed and further denied ever receiving or dispatching orders to execute all who opposed him. General Yamashita in his own defense stated in part that:

"I did not hear at once of the events which took place, nor did I have prior knowledge that they might take place...I was under pressure night and day to plan, study and execute counter attacks against superior American forces...Nine days after my arrival in the Philippines I faced an overwhelming American tide moving on Leyte...I was forced to confront superior U.S. forces with subordinates I did not know and with whose character and ability I was unfamiliar. As a result of the inefficiency of the Japanese Army system, I could not unify my command; my duties were extremely complicated. The troops were scattered and Japanese communications were poor...I became gradually cut off from the situation and found myself out of touch. I believe under these conditions I did the best job I could have done...I did not order any massacres...I put forth my best efforts to control my troops. If this was not enough, then I agree that somehow I should have done more. Some men might have been able to do more. However, I feel I did my best."<sup>11</sup>

"The evidence that was presented to the commission refuted the testimony of General Yamashita in five areas: (a) The number of acts of atrocity, (b) the number of victims, (c) the widespread occurrence, (d) the similarity of

execution, and (e) the number of executions carried out under the supervision of an officer."12

There is no doubt that wide-spread atrocities were committed, that they were organized in nature, involved all nationalities, civilian and military, and were supervised by officers of the Japanese Army. The question of knowledge by General Yamashita is of the utmost importance and whether or not there was a means of communication available that would stop or prevent such acts.

"There was substantial evidence presented that until June 1945 communication was available and on more than one occasion General Yamashita was in close proximity to interment areas and should have or could have had first hand knowledge of conditions and actions that were taking place."13 The evidence cited that wide spread starvation, torture, and general disregard for life was present in the interment camps. In one instance 2,000 Filipino guerillas were executed in Manila in December 1944. These executions were carried out by the Kempei Tai (police) supposedly with General Yamashita's approval.

The testimony of witnesses was often hearsay, and sometimes the most damaging testimony came from suspected collaborators and officers who would later be tried on similar charges.

The trial concluded on December 7, 1945, and Major General Reynolds read the results of the commission to the accused:

"General Yamashita: the commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against the people of the United States, their allies, and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances. Accordingly, upon secret written ballot, two-thirds or more of the members concurring, the commission finds you guilty as charged and sentences you to death by hanging."14

In reviewing the proceedings the commission could have depended on four theories of command responsibility to reach this verdict, "(1) that General Yamashita ordered the executions; (2) that he knew about them and did nothing; (3) that he knew about them and failed to take action to preclude further occurrences; (4) the offenses committed by the troops under General Yamashita were so obviously widespread that under the circumstances he exhibited a personal neglect or abrogation of his duties and responsibilities as a commander amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence."15

#### ENDNOTES

1. Taylor, p. 129.
2. Richard L. Lael, The Yamashita Precedent, War Crimes and Command Responsibility, p. 67.
3. Reel, p. 41.
4. William H. Parks, "Command Responsibility for War Crimes," Military Law Review, Fall 1973, p. 23.
5. Ibid., p.23
6. Taylor, pp. 156-157.
7. Lael, p. 74.
8. Taylor, p. 159.
9. Ibid, p. 160.
10. William Manchester, American Caesar, Douglas MacArthur 1880-1964, p. 569.
11. Barker, pp. 154-155.
12. Parks, pp. 24-25.
13. Ibid.
14. Taylor, p. 168.
15. Parks, pp. 30-31.

## CHAPTER IV

### THE REVIEW

After the Commission reached its verdict an appeal was made to the Philippine Supreme Court and a stay of execution was granted by the Secretary of War. The appeal was based on jurisdiction. It was the contention of the defense council that the commission had no jurisdiction since this was a civil matter, rather than a military matter. "The court ruled that the petition could not be granted as to do this would be a violation of faith with the liberating forces."<sup>1</sup>

The next appeal was to the U.S. Supreme Court. The Supreme Court agreed to hear the case on January 7, 1946. "This decision by the court to hear the case was not welcomed by General MacArthur who felt that this was not a matter for the Supreme Court. The Secretary of War personally intervened and directed General MacArthur to stay the execution until the court heard the appeal. MacArthur reluctantly complied."<sup>2</sup>



"The appeal to the U.S. Supreme Court was based on three areas:

(a) jurisdiction of the commission over the accused; (b) failure to state an offense against the law of war, that is, jurisdiction over the offenses; and (c) entitlement to and denial of the accused's fundamental right of a fair trial thereby divesting the commission of jurisdiction to proceed."<sup>3</sup>

Four weeks later on 4 February 1946 the court handed down its decision. Six of the nine judges felt the Supreme Court lacked the jurisdiction to question the fairness of the trial, and that the military had the authority to conduct the trial. Justice Jackson chose not to take part, and Justices Murphy and Rutledge dissented.

Chief Justice Stone wrote the majority opinion and in the statement recognized that "we are not concerned with the guilt or innocence of (Yamashita). We considered here only the lawful power of the Commission to try (him) for the offense charged.....If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their error of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."<sup>4</sup>

Justice Murphy vehemently disagreed and in his comments stated that:

"To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.

That there were brutal atrocities inflicted upon the helpless Filipino people...is undeniable....That just punishment should be meted out to all those responsible for criminal acts of this nature is also beyond dispute. But these factors do not answer the problem in this case. They do not justify the abandonment of our devotion to justice in deciding with a fellow enemy commander. To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals.

War breeds atrocities. From the earliest conflicts of recorded history to the global struggles of modern times inhumanities, lust and pillage have been the inevitable by-products of man's resort to force and arms. Unfortunately, such despicable acts have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among the victimized peoples....

If we are ever to develop an orderly international community based upon a recognition of human destiny it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness."<sup>5</sup>

Justice Murphy also added: "Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fellow commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality."<sup>6</sup>

Justice Rutledge also disagreed with the majority and felt that Yamashita had been denied a fair trial.

"This was not a trial in the traditions of the common law and the Constitution...If all these traditions can be so put away, then indeed we will have embarked upon a new but forbidding era of law....

It was a great patriot who said: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates his duty he establishes a precedent that will reach himself.""7

"The Supreme Court in addressing the law of war cited the provisions of Articles 1 and 43 to the Annex of the fourth Hague Convention of 1907, Article 19 of the Tenth Hague Convention, and Article 26 of the Geneva Red Cross Convention of 1929: These provisions plainly imposed on petitioner.... an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."8

The Supreme Court in its majority opinion ruled that the commission, as a military court, had the lawful authority to try the case. In General Yamashita's case his guilt or innocence was not addressed.

Immediately following the Supreme Court's decision the case went back to General MacArthur for a final review of the trial and sentence. General MacArthur found no reason to change the outcome of the proceedings and released his decision:

"It is not easy for me to pass penal judgement upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstance on his behalf. I can find none. Rarely has so cruel and wanton a record been spread to public gaze.

Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits--sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier faith. The transgressions resulting there from as revealed by the trial are a blot upon the military profession, a stain upon civilization and constitute a memory of shame and dishonor that can never be forgotten. Peculiarly callous and purposeless was the sack of the ancient city of Manila, with its Christian population and its countless historic shrines and monuments of culture and civilization, which with campaign conditions reversed had previously been spared.

It is appropriate here to recall that the accused was fully forewarned as to the personal consequences of such atrocities. On October 24--four days following the landing of our forces on Leyte--it was publicly proclaimed that I would "hold the Japanese Military authorities in the Philippines immediately liable for any harm which may result from failure to accord prisoners of war, civilian internees or civilian non-combatants the proper treatment and the protection to which they of right are entitled.

No new or retroactive principles of law, either national or international, are involved. The case is founded upon basic fundamentals and practice as immutable and as standardized as the most matured and irrefragable of social codes. The proceedings were guided by that primary rational of all judicial purpose--to ascertain the full truth unshackled by any artificialities of narrow method or technical arbitrariness. The results are beyond challenge.

I approve the findings and sentence of the Commission and direct the Commanding General, United States Army Forces, Western Pacific, to execute the judgement upon the defendant, stripped of uniform, decorations and other appurtenances signifying membership in the military profession."9

#### ENDNOTES

1. Taylor, p. 197
2. Ibid., p. 198.
3. Parks, pp. 33-34.
4. Taylor, pp. 204-205.
5. Ibid., pp. 208-209.
6. Ibid., p. 211.
7. Ibid., p. 215.
8. Parks, p. 34.
9. Parks, pp. 36-37.

## CHAPTER V

### CONCLUSION

In the case against General Yamashita the prosecution presented 123 specifications which resulted in the testimony of 286 witnesses, and the submission of 423 documents in evidence. The prosecution essentially relied on the following points to prove their case:

- (1) The number of atrocities.
- (2) The number of victims.
- (3) The widespread number of atrocities.
- (4) The similarity of execution.
- (5) The number of atrocities carried out under the supervision of an officer.
- (6) General Yamashita ordered the execution.
- (7) General Yamashita did nothing to stop the atrocities.
- (8) He exhibited personal neglect in the exercise of his command.

The counsel for General Yamashita countered by building its defense on the following points:

- (1) The extreme tactical situation led to a breakdown in command, control, and communication.
- (2) A duplicity of command within the Japanese armed forces contributed to poor control.
- (3) General Yamashita was unaware of atrocities.
- (4) General Yamashita did not order atrocities to be committed.
- (5) A military commission had no jurisdiction over the accused.
- (6) The defendant was denied a fair trial as a result of the expeditious handling.

In the case of General MacArthur he had decided that there was a distinct commitment to perfect conduct, and a special morality, that is bestowed upon soldiers. There were several influencing factors in General MacArthur's actions with General Yamashita. He was influenced in his moral and ethical decision making process to some degree by; the international perspective, his ego, his military background, his connection with the Filipino population, and the organization he commanded.

"In the international sphere the trial and punishment of General Yamashita for the deaths of thousands of Filipinos may have reduced the animosity of the combatants and assisted in the peace process."<sup>2</sup>

General MacArthur wrote, "Skilled officers, like all other professional men, are products of continuous and laborious study, training, and experience....Trained officers constitute the most vitally essential element in modern war....An Army can live on short rations, it can be insufficiently clothed and housed, it can even be poorly armed and equipped, but in action it's doomed without the trained and adequate leadership of officers."<sup>3</sup> General MacArthur believed that good soldiers and officers were definitely products of their environment, and were accountable for their failures as leaders.



General MacArthur was reluctant to allow the Supreme Court to review a proceeding that he had duly constituted as the Supreme Commander. Although his actions were upheld, the finding and recommendations of the Reynolds Commission reflect the righteousness of his philosophy; "The proceedings were guided by that primary rationale of all judicial purpose--to ascertain the full truth, unshackled by any artificialities of narrow method or technical arbitrariness. The results are beyond challenge."<sup>4</sup>

The decision that was rendered by the Reynolds Commission, General MacArthur, and the Supreme Court established the "must have known" definition for command responsibility that has received continuous scrutiny and revision since 1945.

The "must have known" definition of command responsibility was abandoned in 1948 during the Nuremberg Hostage Case and replaced by the "should have known" logic. The Nuremberg Hostage Case, tried by civilian judges ruled that, "In order to convict, that officer must be one who orders, abets, or takes a consenting part in the crime."<sup>5</sup>

"The crucial question facing military tribunals, the judges reasoned, involved the issue of whether a defendant should have known."6

The Hostage Case trial was followed by the Nuremberg High Command Case in October 1948. The High Command Case further revised the definition of command responsibility as the judges ruled that the prosecution must "demonstrate the two essential determinants of culpability: a commanding officer's knowledge of, and his criminal acquiescence in, a violation of a law of war."7

The next case of significance that addressed command responsibility were the My Lai trials in 1971. In his instructions to the jury the trial judge cited the provisions of FM 27-10 stating that, "as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him."8 In addition he stated that "a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and responsible steps to insure compliance with the law of war."9

The definition of command responsibility under international law has been redefined under the Geneva Convention protocols of 1977.

"Article 86 of the protocols outlines the commanders responsibility to act:

#### Article 86 - FAILURE TO ACT

The fact that a breach of the conventions or of this Protocol was submitted by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."<sup>10</sup>

"Article 87 of the protocols addresses the duties of the military commander:

#### Article 87 - DUTIES OF COMMANDERS

The High Contracting parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their command and other persons under their control, to prevent, and where necessary, to suppress and report to competent authorities breaches of the conventions of this protocol."<sup>11</sup>

Under the current protocol the concept of absolute responsibility is gone, but has been replaced by a commanders responsibility to "disseminate

knowledge of the law of war, to seek the advise of Law-of-War legal specialists, and to prevent or repress subordinate's crimes, including initiating investigations and taking appropriate disciplinary measures. Those articles also establish the military commander's personal criminal liability for the crime of "omission".<sup>12</sup>

#### ENDNOTES

1. Jonathan P. Tones, "Indirect Responsibility for War Crimes", Military Review, March 1986, p. 40.
2. Barker, p. 149.
3. James D. Clayton, Years of MacArthur, Vol. 1, 1880-1941, p. 360.
4. Potter, p. 173.
5. Lael, p. 124.
6. Ibid., p. 124.
7. Ibid., p. 127.
8. Weston D. Burnett, "Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom of Shatila and Sabre" Military Law Review, Winter 1985, pp. 122-123.
9. Ibid., p. 125.
10. Ibid., p. 144.
11. Ibid., p. 141.
12. Ibid., p. 148.

## CHAPTER VI

### DISCUSSION TOPICS AND SUPPLEMENTARY READING

The following are case study discussion topics suggested for the prosecution:

(1) Was the commission adequately prepared, and constituted to hear the case? The Reynolds Commission had only a short time to prepare for a trial that set a precedent in the definition of command responsibility. The members of the commission were not lawyers or legal experts and were all products of their military environments.

(2) The prosecution submitted in evidence hearsay, and affidavits as testimony that did not allow for the normal cross examination permitted in capital cases. This was contrary to the normal due process required under the law.

(3) The prosecution never proved that General Yamashita personally issued an order to commit atrocities or committed them himself. In addition, there was only circumstantial evidence presented that he knew of the atrocities. He was convicted on the basis of the "must have known" logic of command responsibility.

(4) Did the prosecution try General Yamashita based on his alleged crimes, or on the basis of retribution for the devastation in the Philippines? General MacArthur wanted to have this trial completed quickly. His relationship with the population cannot be discounted as a motivation to have a quick and satisfactory resolution to this trial.

The following are case study discussion topics suggested for the defense:

(1) How could a commander, with so much experience not know that atrocities were being committed? The answer to this question probably lies in his inability to control a deteriorating situation that led to his subordinate commanders and soldiers acting on their own initiatives.

(2) Why didn't General Yamashita pursue a consolidation of his command at an earlier date? A consolidation of all the forces would have provided better command and control, but the Japanese military structure essentially prohibited such consolidation.

(3) Did General Yamashita live up to a code of ethics and morality built on Eastern or Western values? General Yamashita was a product of his eastern values, but understood the values placed on human life as a result of his assignments in Western Europe.

(4) Was General Yamashita provided adequate opportunity to defend himself at his trial? Based upon the actual time allotted for trial preparation the defense was woefully unprepared. This resulted in an appeal based upon jurisdiction rather than the facts of the case.

(5) Should a commander be convicted on the basis of the "must have known" logic of command responsibility? The "must have known" logic places total responsibility for the actions of command with one person. In an environment of decentralizing control it is difficult to lay total responsibility with one person. Each member in the chain holds a certain responsibility to insure the law is understood and enforced.

The following is a list of supplementary reading for further study:

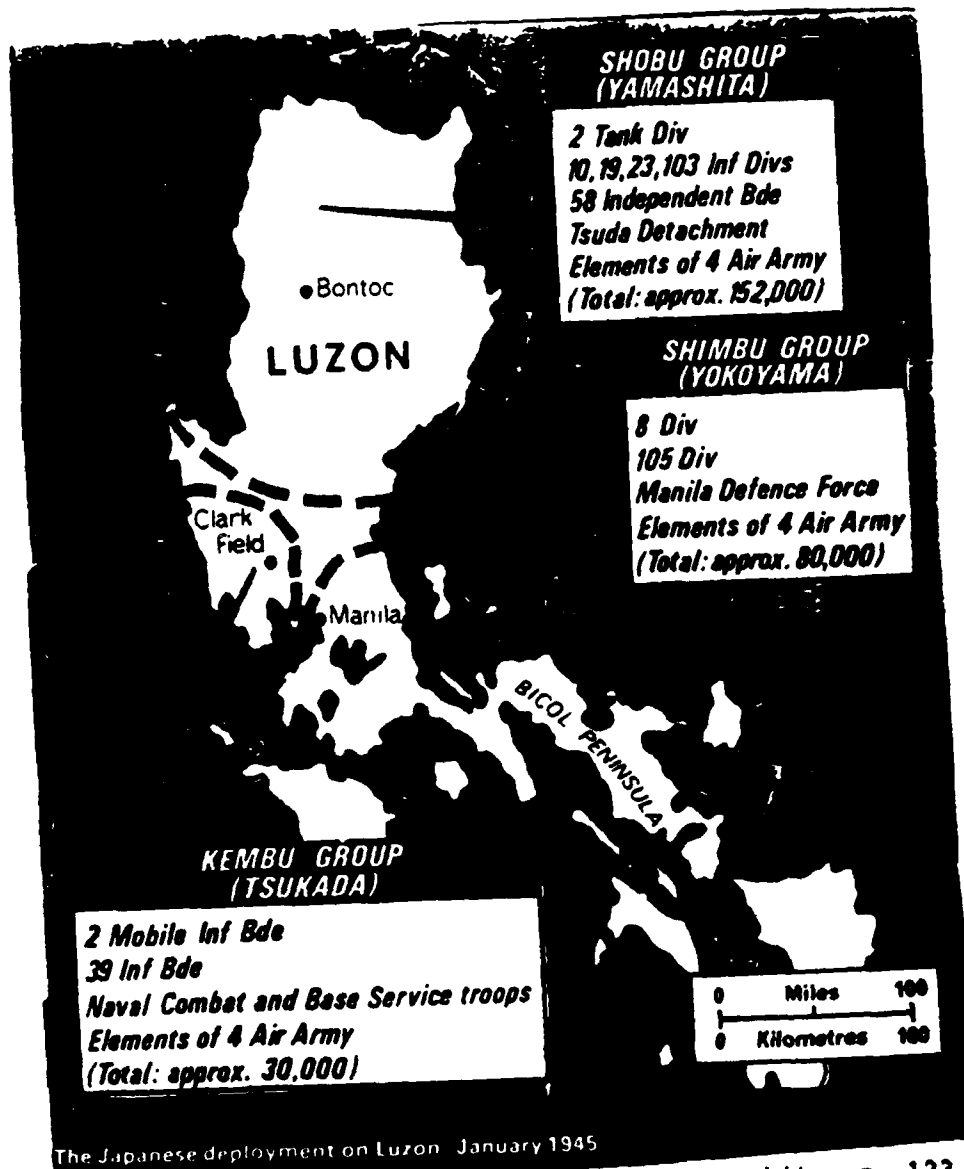
PROSECUTION:

- (1) Weston D. Burnett, "Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra.", Military Law Review, Winter 1985.
- (2) William H. Parks, "Command Responsibility For War Crimes", Military Law Review, Fall 1973.



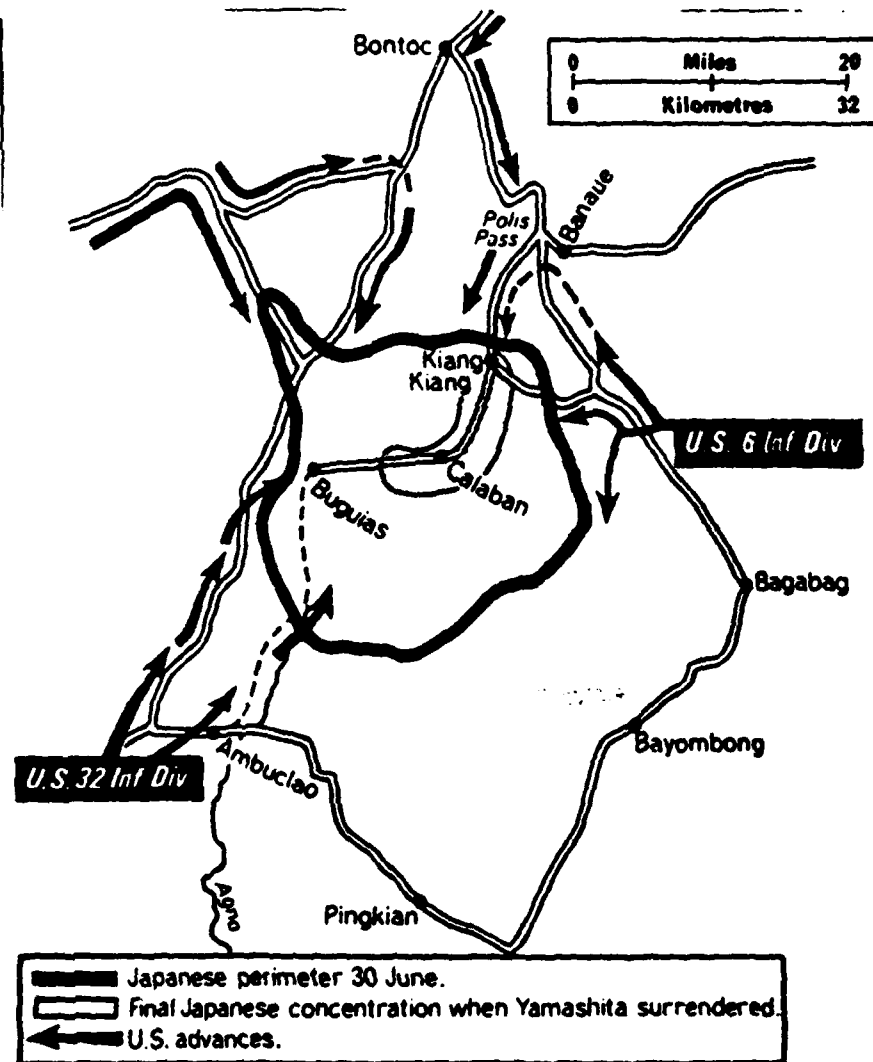
DEFENSE:

- (1) Peter J. Bein, "General MacArthur and the Yamashita Decision September 1944-February 1946.", Major Study Project, U.S. Army War College, Carlisle Barracks, Pennsylvania 1989.
- (2) Frank A. Reel, The Case of General Yamashita, Octagon Books, New York, 1971.



Source: A. J. Barker, Yamashita, p. 123.  
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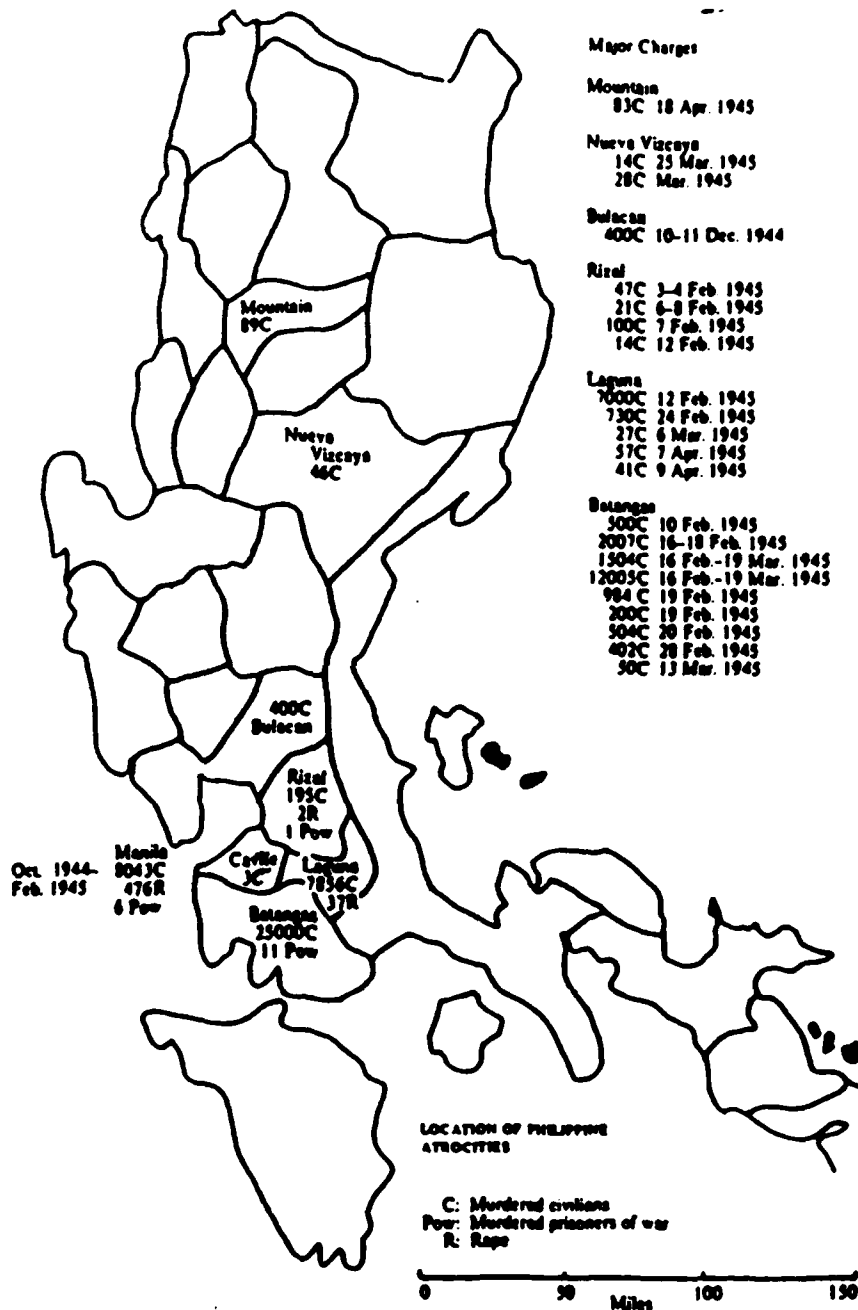
## APPENDIX 2



The final operations against Yamashita in Northern Luzon, July-August 1945

Source: A. J. Barker, *The Pacific War*, p. 141.  
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# APPENDIX 3



Source: Richard L. Lael,  
The Yamashita Precedent,  
p. 140. Reproduced with Permission

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5. Friedman, Leon, The Law of War - A Documentary History, Vol. 1 & II, Random House, New York, 1972.
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10. Parks, William H., "Command Responsibility For War Crimes", Military Law Review, Fall 1973.
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12. Reel, Frank A., The Case of General Yamashita, Octagon Books, New York, 1971.
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14. Tomas, Jonathan P., "Indirect Responsibility for War Crimes", Military Law Review, March 1986.
15. Toman, Jiri, The Laws of Armed Conflict, A.W. Sijthoff-Leiden, Geneva, 1973.
16. United States Army, Rules of Land Warfare, Field Manual 27-10, Dept. of Army, 1940.
17. United States Army, Rules of Land Warfare, Field Manual 27-10, Dept. of Army, 1956.
18. Wakin, Malham M., War, Moralitz and the Military Profession, Westview Press, Boulder, CO, 1986.